

# International Peoples Tribunal on the Nuclear Powers and the Destruction of Human Civilisation

University of Sydney  
July 7-8 2016

## Prosecution Memorial submitted by the People

(Alyn Ware)

In re: The People versus

- Xi Jinping, as President of the Peoples Republic of China
- Kim Jong-un, as the Supreme Leader of the Democratic People's Republic of Korea,
- François Hollande, as President of the Republic of France
- Narendra Modi, as Prime Minister of India
- Benjamin Netanyahu, as Prime Minister of Israel
- Nawaz Sharif, as Prime Minister of Pakistan,
- Vladimir Putin, as President of the Russian Federation
- Theresa May, as Prime Minister of the United Kingdom of Great Britain and Northern Ireland
- Barack Obama, as the President of the United States

on the charges of:

- 1) Planning and preparing for the use of nuclear weapons, which would constitute a crime;
  - a) as a weapon of mass destruction (multiple use);
  - b) in or affecting populated areas;
  - c) in any circumstance.
- 2) Making illegal threats to use nuclear weapons;
  - a) as a weapon of mass destruction (multiple use);
  - b) in or affecting populated areas;
  - c) in other unspecified circumstances.

In re: the People v Malcolm Turnbull, as Prime Minister of Australia on the charges of:

- 1) Aiding and abetting the planning and preparation for the use of nuclear weapons, which would constitute a crime:
- 2) Making illegal threats to facilitate, support, aid and abet the use nuclear weapons;

### A. The Facts

## 1) Policies and acts of the defendants regarding the use and threat of use of nuclear weapons

### a) *Possession of nuclear weapons and plans to use them.*

The governments of China, Democratic Peoples' Republic of Korea, France, India, Israel, Pakistan, Russia, United Kingdom and the United States have produced nuclear weapons and developed plans for their use in times of armed conflict. Such plans include the multiple use of such weapons as weapons of mass destruction, the use of nuclear weapons against populated areas or in ways that would impact indiscriminately on populated areas, and other unspecified uses.

#### - **Nuclear stockpiles:**

According to figures from the Nuclear Notebook<sup>1</sup>, Arms Control Association and Stockholm International Peace Research Institute:

- China is estimated to have approximately 260 nuclear warheads;
- France has about 300 nuclear warheads,
- India has between 110 and 120 nuclear warheads;
- Israel has a stockpile of approximately 80 nuclear warheads;
- North Korea could have about 6-8 nuclear warheads;
- Pakistan has a nuclear weapons stockpile of 110 to 130 warheads;
- Russia currently has 4,500 nuclear warheads;
- UK has 225 nuclear warheads;
- the USA maintains about 4,760 nuclear warheads

The yields of these warheads range from approximately 1 kt (1/10<sup>th</sup> the explosive force of the Hiroshima bomb) to just over 1 megaton (100 times the Hiroshima bomb). The average yield is around 100 kt.

#### - **Plans to use nuclear weapons in armed conflict.**

The Nuclear Notebook reports that all of the nuclear-armed States (with the possible exception of North Korea) have operational plans and capacity to use nuclear weapons in a conflict, including through delivery by plane or missile. All of the nuclear armed States, with the exception of Israel, have adopted public policies of such use as a weapon of mass destruction, i.e. designed to inflict massive damage on an enemy. Israel has not announced such policy as they neither confirm nor deny whether they in fact possess nuclear weapons. However, it is generally understood that Israel has adopted a similar policy even though it is not public.

Specific targeting information is generally classified. However, it is generally assumed that nuclear-armed States include cities in their range of nuclear targets, as well as

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<sup>1</sup> FAS Nuclear Notebook, co-authored by Hans M. Kristensen and Robert S. Norris. <https://fas.org/issues/nuclear-weapons/nuclear-notebook/>

military and economic targets within or near populated areas. Publicly available nuclear doctrine documents<sup>2</sup>, and statements from leaders of nuclear-armed States, confirm the assumption that nuclear armed States have plans to use nuclear weapons against, or near populated areas. This includes public statements on 'counter-value' targeting, i.e. targeting social and economic assets of value to the enemy, as distinct from 'counter-force' targeting against the enemy's military forces. In addition, declassified nuclear operational plans from the Cold War<sup>3</sup> confirm that USA and the Soviet Union were planning and preparing to use nuclear weapons against cities (counter-value targets) and against military targets within or near cities – as well as against military assets in non-populated areas (counter-force).

*b) Threats to use nuclear weapons.*

The governments of China, Democratic Peoples' Republic of Korea, France, India, Israel, Pakistan, Russia, United Kingdom and the United States also maintain policies of threatening to use nuclear weapons against other nations in both peace-time and war-time.

The threat to use nuclear weapons is distinct from, but linked to, the actual use of nuclear weapons, and the planning and preparation to use nuclear weapons. It is conceivable that States could possess nuclear weapons without threatening to use them. This could include, for example, transitional possession such as the possession of nuclear weapons by Kazakhstan, Ukraine and Belarus upon achieving independence from the USSR, and until the weapons had been repatriated to Russia and dismantled. Or it could include the situation of South Africa, which possessed nuclear weapons in secret.

None of the current nuclear-armed States have such policies of possession without also having policies threatening to use such weapons. These threats are communicated generally to other nations through the adoption of nuclear deterrence policies – a statement to other nations that nuclear weapons could be used against them. The threat is also communicated by the nuclear armed states maintaining their nuclear weapons systems in a ready-to-use capability, along with military training and exercises to use the weapons.

*c) First-use policies.*

In addition to the general practice of deterrence and military readiness to use nuclear weapons, the governments of France, Israel, Pakistan, Russia, the United Kingdom and the United States maintain policy options for the first use of nuclear weapons, even before nuclear weapons have been used against them.

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<sup>2</sup> Such as the U.S. Doctrine for Joint Nuclear Operations, Joint Chiefs of Staff, March 2005

<sup>3</sup> See U.S. Cold War Nuclear Target Lists Declassified for First Time, The National Security Archive, <https://nsarchive.gwu.edu/nukevault/ebb538-Cold-War-Nuclear-Target-List-Declassified-First-Ever/>

The governments of Russia and the United States maintain high operational readiness to use a portion of their nuclear arsenals within minutes on launch-on-warning policies.

d) *Extended nuclear deterrence.*

○ **Policy supporting the use of nuclear weapons**

The government of Australia aids and abets the government of the United States in planning and preparing for the use of nuclear weapons in times of armed conflict. This includes policy statements supporting, or at least not ruling out, the potential use of nuclear weapons.

In 2014, the government of Australia refused to support a *Joint Statement on the Humanitarian Consequences of Nuclear Weapons*, which was led by the government of New Zealand and endorsed by 155 countries.<sup>4</sup> Australia accepted the principle premise of the statement that any use of nuclear weapons could cause catastrophic humanitarian and environmental consequences, but could not support the conclusion of the statement that nuclear weapons must therefore not be used in any circumstance. Australia not only rejected the joint statement, but initiated their own counter-statement<sup>5</sup> accepting the potential use of nuclear weapons, and campaigned to build support from other countries for this counter-statement.

○ **Logistical support for the use of nuclear weapons**

More significantly, Australia provides logistical support, such as hosting U.S. military facilities vital to the command and control of nuclear weapons systems. This includes the Pine Gap military facility which provides ground-satellite signals information and communications to the United States regarding ballistic missile launches, anti-ballistic missile targeting and targeting of 'enemy' nuclear weapons systems, particularly strategic nuclear submarines. The provision of these information and communications systems make Australia complicit in the planning and preparation for the use of nuclear weapons by the United States.<sup>6</sup>

In addition, the government of Australia accepts visits of U.S. naval vessels and military aircraft that could be carrying nuclear weapons. Australia accepts the policy of the United States to neither confirm nor deny the presence of nuclear weapons on any of its

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<sup>4</sup> *Joint Statement on the Humanitarian Consequences of Nuclear Weapons*, Introduced at the UN General Assembly by Ambassador Dell Higgie of New Zealand on behalf of themselves and 154 other countries, 20 October 2014.

[http://reachingcriticalwill.org/images/documents/Disarmament-fora/1com/1com14/statements/20Oct\\_NewZealand.pdf](http://reachingcriticalwill.org/images/documents/Disarmament-fora/1com/1com14/statements/20Oct_NewZealand.pdf)

<sup>5</sup> *Joint statement on the humanitarian consequences of nuclear weapons by 20 states*, delivered by Ambassador John Quinn of Australia to the UN General Assembly on 20 October 2014.

[http://reachingcriticalwill.org/images/documents/Disarmament-fora/1com/1com14/statements/20Oct\\_Australia.pdf](http://reachingcriticalwill.org/images/documents/Disarmament-fora/1com/1com14/statements/20Oct_Australia.pdf)

<sup>6</sup> See *Home Base*, a review of US military bases and operational agreements with Australia. Richard Tanter, The Australian Financial Review, 23 January 2015. <http://nautilus.org/wp-content/uploads/2011/12/Home-Base-text-and-photos.pdf>

visiting naval vessels or military aircraft. This contrasts, for example, with the policy of New Zealand, which prohibits visits of naval vessels or military aircraft carrying nuclear weapons.

- **Threat to use nuclear weapons**

The government of Australia, in accepting an extended nuclear deterrence relationship with the United States, and in publicly declaring and re-affirming this security policy, makes a general threat to facilitate, support, aid and abet the use of nuclear weapons by the United States against other nations in order to defend Australia.

The government has indicated that this policy is primarily to defend Australia against a nuclear attack by another country.

*'Australia's security is underpinned by the ANZUS Treaty, United States extended deterrence and access to advanced United States technology and information. Only the nuclear and conventional military capabilities of the United States can offer effective deterrence against the possibility of nuclear threats against Australia.'*<sup>7</sup>

However, the government has not ruled out the first-use of nuclear weapons against a nuclear-armed enemy, and even retaliatory use in response to a nuclear attack would be illegal (see Section B below)

- **Financial support for nuclear weapons programs**

Australia's Commonwealth Future Fund has holdings in 15 companies involved in the production and maintenance of nuclear weapons. The total value of its holdings in these nuclear weapons companies at 12 April 2011 was A\$135.4 million. The Australian government has been informed that such investments of public funds in nuclear weapons corporations could violate both international and Australian law, and that other countries such as Norway and New Zealand have divested public funds from nuclear weapons corporations. However, so far the Australian government has taken no action to address this issue.<sup>8</sup>

## **2) Impact and consequences of the use of nuclear weapons**

### *a) General characteristics of nuclear weapons*

The general characteristics and impact of nuclear weapons were outlined in the 1996 International Court of Justice Advisory Opinion on the Legality of the Threat or Use of Nuclear

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<sup>7</sup> 2016 Defence White Paper, Australian Defence Department, para 5.20, p121.

<sup>8</sup> **Nuclear weapons and Australia's Future Fund: Why the Future Fund should divest from nuclear weapons companies**, Tim Wright, ICAN Australia. <http://www.icanw.org/wp-content/uploads/2013/03/ICAN-FutureFund.pdf>

Weapons. The Court examined the various effects of nuclear-weapons-use including explosive blast, creation of fire-storms, and radioactive contamination/fallout.

The ICJ reported that:

*'Nuclear weapons are explosive devices whose energy results from the fusion or fission of the atom. By its very nature, that process, in nuclear weapons as they exist today, releases not only immense quantities of heat and energy, but also powerful and prolonged radiation... The radiation released by a nuclear explosion would affect health, agriculture, natural resources and demography over a very wide area... According to the material before the Court, the first two causes of damage are vastly more powerful than the damage caused by other weapons, while the phenomenon of radiation is said to be peculiar to nuclear weapons. These characteristics render the nuclear weapon potentially catastrophic.'*<sup>9</sup>

The ICJ concluded that:

*'The destructive power of nuclear weapons cannot be contained in either space or time. They have the potential to destroy all civilization and the entire ecosystem of the planet.'*

*b) Use as a weapon of mass destruction – multiple use*

The multiple use of nuclear weapons would create catastrophic human and environmental consequences, due the combined impact of blast and fire storm effects, radioactive contamination and fallout, and gross impact on the earth's climate. Most of these impacts would be trans-generational.

Depending on the number of nuclear weapons used and the targets hit, the extent of impact could range from widespread damage to the regions and populations surrounding the targets, to catastrophic damage to regional and global human support systems, to destruction of human civilization, or even the possibility of human extinction.

Recent evidence indicates that the threshold number of nuclear detonations that could trigger the destruction of human civilization – and possibly human extinction - is much lower than previously understood. As few as 50 nuclear weapons detonated on cities or inflammable targets possibly could generate catastrophic climatic consequences leading to a collapse of human civilization.<sup>10</sup> New evidence on the severity of damage caused by ionizing radiation, as well as new evidence of the impact of nuclear weapons on increasingly interconnected human support systems, reinforce the conclusion that just a low number of nuclear detonations could destroy human civilization.<sup>11</sup> These facts are now widely accepted in international discourse and diplomacy.

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<sup>9</sup> Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons, delivered on July 8, 1996. Para 35.

<sup>10</sup> See Owen B. Toon, Richard P. Turco, Alan Robock, Charles Bardeen, Luke Oman, and Georgiy L. Stenchikov, Atmospheric effects and societal consequences of regional scale nuclear conflicts and acts of individual nuclear terrorism, Atmospheric Chemistry and Physics, Vol. 7, 2007, p. 1973-2002.

<sup>11</sup> See, The Effects of Nuclear Weapons on Human Health, ICRC, 2013.

<https://www.icrc.org/eng/assets/files/2013/4132-1-nuclear-weapons-human-health-2013.pdf>

*c) In or affecting populated areas*

Evidence from the nuclear detonations in Hiroshima and Nagasaki – a single bomb on each city – indicates that nuclear weapons detonated on cities would cause indiscriminate harm to civilians resulting in extensive death, injuries and transgenerational impact. Such detonations would also destroy, or severely damage, human support systems.

Evidence from nuclear test detonations, in the Marshall Islands, Algeria, Nevada, French Polynesia, Kazakhstan and other nuclear test sites, indicates that nuclear weapons detonated some distance from human populations, would still impact severely on them. Multiple nuclear weapon detonations would have a much greater impact than single detonations. The International Court of Justice concluded in 1996 that ‘the destructive impact of nuclear weapons cannot be contained in time or space.’

Indeed multiple detonations could cripple or destroy nearly all of the infrastructure vital to 21<sup>st</sup> century humanity—financial, agricultural, industrial, health, transport, cultural and educational and more, along with the internet. Multiple detonations could also severely damage, or even destroy, ecological systems upon which all life is based. Casualties could run into billions and civilization as we know it could cease, with a definite risk of human extinction to follow.

*d) Use in any circumstance including single detonation in armed conflict*

The series of international conferences since 2013 on the humanitarian impact of nuclear weapons has brought forth additional evidence indicating that even a single nuclear weapon detonated in a populated area or to produce an electro-magnetic pulse could cause catastrophic consequences for human health.

The use of a nuclear weapon in the atmosphere to produce an electro-magnetic pulse, for example, could disable or destroy electric grids and IT networks and systems (internet, mobile phone networks...) which are vital to human health – such as for hospitals, transport controls, water supply systems etc.

In addition, the stated retaliatory policy of nuclear-armed States and nuclear-game theory modelling indicate that a single use of a nuclear weapon in an armed conflict is most likely to trigger counter-use leading to multiple use of nuclear weapons.

Additional information on the policies, impact and consequences of nuclear weapons use is presented to this Tribunal in the appended Rational Brief.

**3) Risks of nuclear weapons use**

Proponents of nuclear deterrence assert that the threat to use nuclear weapons is necessary to deter a potential aggressor from using nuclear weapons and it therefore prevents the use of nuclear weapons. However, to be ‘credible’, such policy requires a willingness to use nuclear weapons and demonstrations of such willingness, especially during times of conflict between the nuclear-armed States. This makes nuclear-weapons-use increasingly likely if nuclear

deterrence is maintained indefinitely.

Probability theory holds that if there is more than a 0% probability of an event happening in any one year, and the conditions for such an event occurring are maintained, then it is only a matter of time before the probability of the event occurring draws close to 100%. Thus, if nuclear weapons are maintained indefinitely, along with nuclear deterrence policies that include options for use, then such use becomes inevitable over time.

Mathematician Ike Jeans notes that *'for any given probability of a nuclear war per year, there is an expected time span until it occurs. Thus, the longer we wait without creating a safer world, the more likely it is that nuclear warfare will occur'*.<sup>12</sup>

Various bodies of nuclear risk analysis concur with the view that nuclear deterrence either has to be rescinded or nuclear weapons will be used at some point in time. A recent study by Chatham House, for example, explores risks of nuclear weapons use, concludes that the risks are much higher than assumed by military and policy planners, and notes that one indication of such risk is that nuclear weapons have nearly been used at least 13 times since 1945.<sup>13</sup>

Further examination of the risks of nuclear deterrence and the probability of nuclear weapons-use is presented to the court in the *Brief on Nuclear Deterrence* also submitted to this Tribunal.

## B. The Law

### 1) Illegality of the use of nuclear weapons

The rules of international humanitarian law (IHL) applicable in wartime, or *jus in bello*, hold that it is prohibited to use weapons or methods of warfare which:

- a) would be disproportionate, i.e. excessive in relation to the concrete and direct military advantage anticipated
- b) target civilians or cause indiscriminate harm to civilians;
- c) cause unnecessary suffering to combatants,
- d) violate neutral territory;
- e) cause widespread damage to the environment.

These laws are generally accepted as customary international law, applying to all states at all times during armed conflict, as well as to individuals and non-state actors involved in armed conflict. Most military operational manuals of state defence forces incorporate IHL.<sup>14</sup> States, including the nuclear-armed States, have affirmed in a number of forums the application of IHL

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<sup>12</sup> See *Forecast and solution: grappling with the nuclear*, Ike Jeans. Pocahontas Press, 1996

<sup>13</sup> *Too Close for Comfort: Cases of Near Nuclear Use and Options for Policy*, Chatham House, London, 2014  
<https://www.chathamhouse.org/publications/papers/view/199200#sthash.nOPGHjWB.dpuf>

<sup>14</sup> The U.S. Air Force, for example, accepts in Air Force Doctrine Document 2-1.5 (15 July 1998), p. 9, that: "Under international law, **the use of a nuclear weapon must be based on the same targeting rules applicable to the use of any other lawful weapon**, i.e., the counterbalancing principles of military necessity, proportionality, distinction, and unnecessary suffering" (emphasis in original).

at all times. This includes in the Rome Statute for an International Criminal Court<sup>15</sup> and in the submissions of States to the ICJ for the nuclear weapons case.<sup>16</sup>

It is also reaffirmed in the final document of the 2010 Non-Proliferation Treaty Review Conference, agreed by all States Parties to the NPT:

*“The Conference expresses its deep concern at the catastrophic humanitarian consequences of any use of nuclear weapons, and reaffirms the need for all States **at all times** to comply with applicable international law, including international humanitarian law.”<sup>17</sup>*

#### **a) Use as a weapon of mass destruction**

The use of nuclear weapons as a weapon of mass destruction, could entail multiple use of nuclear weapons against cities, civilian infrastructure, or the environment.

Such use clearly violates international humanitarian law. It would violate the rule of proportionality as it would be excessive in relation to concrete military objectives – which must relate to destroying military forces of the opposition and not civilians or non-military objects. Such use would cause indiscriminate harm to civilians from the blast, firestorms, radiation, destruction of critical civil services and impact on the environment. Such use would also cause damage to neutral states, cause long-term unnecessary suffering on combatants and cause widespread damage to the environment.

Such use would also be illegal if used in retaliation to the prior use of nuclear weapons by an enemy. Retaliation to aggression is permitted under international law, but such retaliation is also constrained by IHL. Even if the enemy has violated IHL, and reprisals are being contemplated in order pressure the enemy to cease such acts, this does not permit the violation of IHL in response. Civilians are always protected under IHL regardless of the actions of their governments. This is outlined, for example, in UN General Assembly resolution 2675, which states that *‘civilian populations, or individual members thereof, should not be the object of reprisals.’*<sup>18</sup>

This is supported in the 1996 ICJ Advisory Opinion which affirms that: *‘States must **never** make civilians the object of attack and must consequently **never** use weapons that are incapable of*

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<sup>15</sup> Article 8(b)(iv) of the Rome Statute, for example, includes as crimes under the jurisdiction of the International Criminal Court: *“Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.”*

<sup>16</sup> The International Court of Justice, for example, in the 1996 Advisory Opinion, ‘...notes that the nuclear-weapon States appearing before it either accepted, or did not dispute, that their independence to act was indeed restricted by the principles and rules of international law, more particularly humanitarian law (see below, paragraph 86), as did the other States which took part in the proceedings.’ ICJ Advisory Opinion 1996, para 22

<sup>17</sup> Final Agreed Document, 2010 Conference of States Parties to the Nuclear Non-Proliferation Treaty

<sup>18</sup> UN General Assembly, Res. 2675 (XXV) (adopted 9 December 1970, by 109 votes in favour, none against and 8 abstentions)

*distinguishing between civilian and military targets.'*<sup>19</sup>

The non-derogable nature of IHL, i.e. its application at all times regardless of circumstances, is similar in principle to the prohibition against torture. Even if an enemy government, for example, captures and tortures nationals of a country, it does not give that country the right to apprehend and torture nationals of the enemy country. IHL and the law prohibiting torture are similar in providing unyielding protection to civilians regardless of the illegal or egregious acts of their governments.

- Genocide

The use of nuclear weapons *as weapons of mass destruction* would also violate the law on Genocide which prohibits '*acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group.*'

The ICJ in 1996 could not determine whether the use of nuclear weapons in any circumstance would constitute an act of genocide, but that '*it would only be possible to arrive at such a conclusion after having taken due account of the circumstances specific to each case.*' Indeed, the use of a single nuclear weapon against a military target would likely not constitute genocide as it would be insufficient to destroy a national, ethnical or religious group. On the other hand, the multiple use of nuclear weapons as a *method of mass destruction* would constitute Genocide as such use would, or could, destroy such a group.

The definition of Genocide includes a determination that there is *intent* to destroy a national, racial or religious group. Acts which do not intend to destroy such a group, but have that effect, might escape the definition of genocide. An example of this could be the colonization of a country and the resultant destruction, in whole or part, of indigenous communities from the infectious diseases introduced by the colonisers. The colonisers could be forgiven for not having fore-knowledge that their settlements would cause such a devastating impact on the indigenous peoples. However, C.G. Weeramantry argues that anyone using nuclear weapons, especially multiple use of nuclear weapons, would be aware that such use could destroy an ethnic, national or religious group, and that acting with this fore-knowledge would make the act one of genocide.

*'In discussions on the definition of genocide in the Genocide Convention, much play is made upon the words "as such". The argument offered is that there must be an intention to target a particular national, ethnical, racial or religious group qua such group, and not incidentally to some other act. However, having regard to the ability of nuclear weapons to wipe out blocks of population ranging from hundreds of thousands to millions, there can be no doubt that the weapon targets, in whole or in part, the national group of the State at which it is directed.'*<sup>20</sup>

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<sup>19</sup> ICJ 1996 Advisory Opinion, para 78

<sup>20</sup> C.G. Weeramantry, *Dissenting Opinion of Judge Weeramantry in the 1996 International Court of Justice Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*. pp280

- Ecocide

Ecocide is an international crime relating to causing extensive damage to, destruction of or loss of ecosystem(s) of a given territory.

The crime of ecocide finds partial expression in international humanitarian law, which prohibits acts causing long-term and severe damage to the environment as means of warfare. It also finds partial expression in various declarations and agreements on the environment, such as Draft Article 19 (3) (d) on *State Responsibility* prepared by the International Law Commission in 1996 in which it classified massive pollution of the atmosphere or of the seas as an *international crime*.<sup>21</sup>

At a national level, ecocide is included in the criminal law of at least 10 national jurisdictions. In a number of these jurisdictions<sup>22</sup>, ecocide is defined as:

*'Mass destruction of flora or fauna, poisoning the environment, the soils or water resources, as well as implementation of other actions causing an ecological catastrophe.*

Multiple use of nuclear weapons would generate ecological damage sufficient to warrant the charge of ecocide. This would arise from:

- a) the radioactive contamination of environments which would be extensive and lasting for generations, and
- b) the catastrophic climatic consequences of nuclear weapons being used in populated areas or on military targets.

A number of reports have indicated that the use of nuclear weapons would constitute the crime of ecocide. These include Whitaker Report, produced by the Sub-Commission on the Promotion and Protection of Human Rights on the question of the prevention and punishment of the crime of genocide. The report noted that:

*"... the definition of genocide should be broadened to include cultural genocide or "ethnocide", and also "ecocide": adverse alterations, often irreparable, to the environment - for example through nuclear explosions, chemical weapons, serious pollution and acid rain, or destruction of the rain forest - which threaten the existence of entire populations, whether deliberately or with criminal negligence.'*<sup>23</sup>

- Destruction of human civilisation

Human civilization comprises a complex web of societies, infrastructures, and systems upon which human interaction is built. These include systems and infrastructures for housing, food, trade, finance, communication, energy, education, sports, arts, cultural heritage, travel, health and decision-making.

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<sup>21</sup> Draft Article 19 (3) (d) on "State Responsibility" of the International Law Commission, cited in C.G. Weeramantry 1996, pp280

<sup>22</sup> Armenia, Belarus, Kazakhstan, Kyrgyzstan, Moldova, Russian Federation, Ukraine, Tajikistan

<sup>23</sup> The Whitaker Report E/CN.4/Sub.2/1985/6. pp page 17, para 33.

Multiple use of nuclear weapons could lead to a collapse of some or all of the systems and infrastructures that form the basis for current civilization.

The recent scientific studies on *climatic consequences* of multiple use of nuclear weapons, for example, indicates that even the use of a low number of nuclear weapons – in the tens – could impact so severely on the climate as to cause significant temperature drops, widespread failure of crops and massive starvation. Such a scenario would likely lead to a break down in current social, political and economic systems – in other words, an end to human civilization as we know it. The massive destruction from the blast impact of multiple nuclear detonations and the extreme and transgenerational impact of radiation released from multiple detonations could have a similar impact. All that might be left would be small groups of people trying to survive in fall-out shelters with minimal capacity to produce food and acquire uncontaminated water for survival.

The International Court of Justice in highlighting the wide-spread and long-term damage to the environment from the use of nuclear weapons, affirmed that *'The destructive power of nuclear weapons cannot be contained in either space or time. They have the potential to destroy all civilization and the entire ecosystem of the planet.'*

This degree of destruction to human society and the environment, i.e. total destruction, is even more wide-spread, catastrophic and irreversible than genocide or ecocide. The crime of destroying human civilization is therefore even more egregious than the crimes of genocide or ecocide. The crime of destroying human civilization – or threatening to undertake acts that could destroy human civilisation – could be called a 'total crime' or an 'absolute crime'.

- Omnicide

*Omnicide* is the crime of causing human extinction. Most commonly it refers to extinction through nuclear warfare or biological warfare, but it can also apply to extinction through human-created ecological catastrophe, such as the destruction of the climate.

The crime of omnicide is considered the 'ultimate crime'. No other crime has such terminal and irrevocable impact on humanity, or the environment sustaining life. Indeed, the crime of omnicide is impossible to test. If humans become extinct from an omnicidal act – such as global nuclear war – there will be no courts surviving to try the criminals and no criminals surviving to be tried.

However, the planning and preparing of acts which could result in omnicide are already in themselves crimes against humanity and can be tried in this tribunal. The planning and preparation to use nuclear weapons as weapons of mass destruction constitutes such a crime against humanity, as such use could lead to human extinction.

**b) Use against or near populated areas**

Nuclear weapons could impact on populated areas even if they are not used as a weapon of

mass destruction.

The single use of a nuclear weapon against a military target in a populated area would violate the principles of international humanitarian law, as outlined above, as such an attack would cause indiscriminate harm to civilians as well as unnecessary suffering to combatants and long-term and severe damage to the environment.

Indeed the Tokyo District Court ruled in the 1963 *Shimoda Case* that the detonation of single bombs each on Hiroshima and Nagasaki by the United States in 1945 violated this law:

*'The aerial bombardment with atomic bombs of the cities of Hiroshima and Nagasaki was an illegal act of hostilities according to the rules of international law. It must be regarded as indiscriminate aerial bombardment of undefended cities, even if it were directed at military objectives only, inasmuch as it resulted in damage comparable to that caused by indiscriminate bombardment.'*<sup>24</sup>

The detonation of a nuclear weapon close to a populated area would also cause indiscriminate harm to civilians as well as unnecessary suffering to combatants and long-term and severe damage to the environment. While the populated area might escape the blast effect of the detonation, it would not escape the impact of the high levels of radiation created by the detonation – which would travel through the air, waterways and food supply chains for multiple generations.

In addition, the impact of ionizing radiation on human and animal genes is transgenerational – causing congenital abnormalities and damaging the health of offspring generations into the future. Exposing humans and animal life to ionizing radiation is not only criminal with regard to the impact on those exposed, but is a crime against future generations who will be impacted.

Depending on the nature of the nuclear detonation, the populated area might also be impacted by an eletro-magnetic pulse which can could destroy electrical grids and communication systems over a wide area. Many life-support systems, which are dependent on electrical grid and communications systems, could be impacted. This could cause mega-disasters in transport systems, water supply systems, nuclear power plants, hospitals etc..., adding to the indiscriminate harm caused by the nuclear detonation.<sup>25</sup>

### **c) Any use of nuclear weapons**

After affirming that IHL applies at all times, the International Court of Justice then applied this law, and other international law, to nuclear weapons and concluded that:

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<sup>24</sup> *Ryuichi Shimoda et al. v. The State*, Tokyo District Court, 7 December 1963

<sup>25</sup> See Nuclear Weapon EMP Effects, Federation of Atomic Scientists, at <https://fas.org/nuke/intro/nuke/emp.htm>

*'...the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law.'*<sup>26</sup>

The International Committee of the Red Cross (ICRC) and the International Federation of Red Cross and Red Crescent Societies (IFRC) have also concluded that the use of nuclear weapons is unable to be reconciled with IHL.

*The Council of Delegates (of the IFRC)*

- 1. emphasizes the incalculable human suffering that can be expected to result from any use of nuclear weapons, the lack of any adequate humanitarian response capacity and the absolute imperative to prevent such use,*
- 2. finds it difficult to envisage how any use of nuclear weapons could be compatible with the rules of international humanitarian law, in particular the rules of distinction, precaution and proportionality.'*<sup>27</sup>

Additional support for the illegality of any use of nuclear weapons is to be found in the *Vancouver Declaration* (see Appendix I for the full Declaration):

*"Well-established and universally accepted rules of humanitarian law are rooted in both treaty and custom; are founded, as the ICJ said, on "elementary considerations of humanity"; and bind all states. They are set forth in armed service manuals on the law of armed conflict, and guide conventional military operations. They include:*

- The prohibition of use of methods or means of attack of a nature to strike military objectives and civilians or civilian objects without distinction. As put by the ICJ, "states must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets."*
- The prohibition of use of methods or means of warfare of a nature to cause superfluous injury or unnecessary suffering.*
- The Martens clause, which provides that in cases not covered by international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.*

*Nuclear weapons cannot be employed in compliance with those rules because their blast, heat, and radiation effects, especially the latter, are uncontrollable in space and time.'*<sup>28</sup>

The United Nations General Assembly has repeatedly adopted resolutions affirming that the

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<sup>26</sup> ICJ Advisory Opinion 1996, para 105

<sup>27</sup> Resolution of the Council of Delegates of the International Federation of Red Cross and Red Crescent Societies (IFRC), prepared in consultation with the International Committee of the Red Cross (ICRC) and adopted on

<sup>28</sup> The *Vancouver Declaration on Law's Imperative for the Urgent Achievement of a Nuclear-Weapon-Free World*, adopted at a conference of international lawyers in Vancouver on February 11, 2011.

use of nuclear weapons would constitute a crime against humanity and a violation of the UN Charter.<sup>29</sup> These resolutions are supported by some, but not all, of the nuclear-armed States.

However, the fact that none of the nuclear armed States has used nuclear weapons in armed conflict since World War II – despite considering options for such use on a number of occasions - contributes to the formation of a customary prohibition on use.

Indeed, the Vancouver Declaration notes that:

*‘Further to this end, in 2010 the United States declared that “it is in the US interest and that of all other nations that the nearly 65-year record of nuclear non-use be extended forever,” and President Obama and Prime Minister Singh jointly stated their support for “strengthening the six decade-old international norm of non-use of nuclear weapons.”*

#### **- Human rights law**

Human rights law is also applicable to nuclear weapons. Article 3 of the Universal Declaration of Human Rights, for example, states: *“Everyone has the right to life, liberty and the security of person.”* The International Court of Justice held that the *Right to Life*, recognized in Article 6(1) of the International Covenant on Civil and Political Rights, must be respected in time of war, and that in that context humanitarian and other law governing the conduct of warfare determines whether deprivation of the right to life is arbitrary in violation of Article 6(1).<sup>30</sup>

The UN Human Rights Committee in 1984 held that designing, testing, manufacture, possession, deployment and use of nuclear weapons are among the greatest threats to the right to life and should therefore *‘be recognized as crimes against humanity’*.<sup>31</sup>

Article 28 of the Universal Declaration states: *“Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.”* This is sometimes known as the *Right to Peace*. Harm to civilian populations by use of nuclear weapons is inconsistent with the principle that *“human rights should be protected by the rule of law...”*

UN General Assembly Resolution A/RES/39/11, on the ‘Right of peoples to peace’ highlights the incongruity of nuclear weapons with the Right to Peace. The resolution emphasizes that *‘in the nuclear age the establishment of a lasting peace on Earth represents the primary condition for the preservation of human civilization and the survival of mankind’* and that *‘ensuring the exercise of the right of peoples to peace demands that the policies of*

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<sup>29</sup> See, for example, UN General Assembly resolution A/RES/70/62, adopted on December 7, 2015 with a vote of 130 in favour, 48 against and 8 abstaining which affirms that ‘any use of nuclear weapons would be a violation of the Charter of the United Nations and a crime against humanity’.

<sup>30</sup> ICJ 1996 Advisory Opinion, Para. 25.

<sup>31</sup> Human Rights Committee, General Comment 14, Article 6 (Twenty-third session, 1984), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 18 (1994).

*States be directed towards the elimination of the threat of war, particularly nuclear war.*<sup>32</sup>

- **Environmental law**

Environmental law is also applicable to nuclear weapons, as affirmed by the International Court of Justice, and this adds further legal weight to the prohibition on the threat and use of nuclear weapons;

*'The Court recognizes that the environment is under daily threat and that the use of nuclear weapons could constitute a catastrophe for the environment. The Court also recognizes that the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.'*<sup>33</sup>

As indicated above, **multiple** use of nuclear weapons would cause extensive and long-term damage to the environment constituting ecocide. C.G. Weeramantry writes that there are a number of intersecting principles in environmental law that render **any use** of nuclear weapons illegal, even if the impact of single use or use of low numbers does not rise to the level of ecocide.

*'Environmental law incorporates a number of principles which are violated by nuclear weapons. The principle of intergenerational equity and the common heritage principle have already been discussed. Other principles of environmental law, which this request enables the Court to recognize and use in reaching its conclusions, are the precautionary principle, the principle of trusteeship of earth resources, the principle that the burden of proving safety lies upon the author of the act complained of, and the "polluter pays principle", placing on the author of environmental damage the burden of making adequate reparation to those affected.'*<sup>34</sup>

Indeed, in 1996 the ICJ conclusion on the general illegality of the threat or use of nuclear weapons was based partially on the Court's finding that *'the use of nuclear weapons would be a serious danger to future generations. Ionizing radiation has the potential to damage the future environment, food and marine ecosystem, and to cause genetic defects and illness in future generations.'*

Evidence compiled from nuclear tests and from the series of conferences on the humanitarian impact of nuclear weapons indicates that use of nuclear weapons on military targets, even some distance from populated areas, would also cause indiscriminate harm, as lethal radiation is able to travel some distance.

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<sup>32</sup> UN General Assembly Resolution A/RES/39/11, *Right of peoples to peace*, adopted on 12 November 1984

<sup>33</sup> ICJ 1996 Advisory Opinion, Para 29.

<sup>34</sup> C.G. Weeramantry dissenting opinion in the 1996 ICJ Advisory Opinion, p280

Evidence presented to the International Court of Justice on the long-range impact of nuclear testing in the Pacific, for example, was instrumental in the ICJ reaching the conclusion noted above that *'The destructive power of nuclear weapons cannot be contained in either space or time.'*

Lijon Eknilang, who presented to the ICJ, noted that her island Rongelap Atoll was about 150 kilometres from Bikini and 470 kilometres from Enewetak Atoll, which were the sites of the nuclear detonations during the testing programme. Despite this distance, the impact on the health of the islanders, particularly from the Bravo nuclear test in 1954, has been catastrophic.

*'Some of our food crops, such as arrowroot, completely disappeared. Makmok, or tapioca plants, stopped bearing fruit. What we did eat gave us blisters on our lips and in our mouths and we suffered terrible stomach problems and nausea. Some of the fish we caught caused the same problems. These were things that had not happened before 1954...*

*My own health has suffered very much, as a result of radiation poisoning. I cannot have children. I have had miscarriages on seven occasions. On one of those occasions, I miscarried after four months. The child I miscarried was severely deformed; it had only one eye....*

*Some of us had brain tumours and other cancers removed. In more recent years, we have come to learn that some of us had our entire thyroids removed.... Women have experienced many reproductive cancers and abnormal births. Marshallese women suffer silently and differently from the men who were exposed to radiation. Our culture and religion teaches us that reproductive abnormalities are a sign that women have been unfaithful to their husbands. For this reason, many of my friends keep quiet about the strange births they had. In privacy, they give birth, not to children as we like to think of them, but to things we could only describe as "octopuses", "apples", "turtles", and other things in our experience... One woman on Likiep gave birth to a child with two heads. Her cat also gave birth to a kitten with two heads.*

*The most common birth defects on Rongelap and nearby islands have been "jellyfish" babies. These babies are born with no bones in their bodies and with transparent skin. We can see their brains and hearts beating. The babies usually live for a day or two before they stop breathing. Many women die from abnormal pregnancies and those who survive give birth to what looks like purple grapes which we quickly hide away and bury.'*<sup>35</sup>

The Marshall Islands, in presenting the information on the long-range impact of nuclear tests, noted that this impact was felt even when the nuclear weapons were detonated in peace-time,

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<sup>35</sup> Testimony of Lijon Eknilang, *Oral Presentation of the Marshall Islands to the International Court of Justice*, Tuesday 14 November 1995

some distance from populated areas, with military planners able to decide the time, date, location and nature of test explosion in order to minimize collateral damage – a luxury often not available in wartime.

*'We may reasonably conclude based on the evidence of widespread fallout that few, if any, of the 1,225 islands in the Marshall Islands' 850,000 square miles of ocean space escaped radioactive contamination. Only Bikini and Enewetak were the sites of the nuclear detonations, but the effects were experienced on atolls throughout the Marshall Islands, and in fact on distant Continents.'*<sup>36</sup>

*'..it may reasonably be concluded from the experience of the Marshall Islands that damage cannot be expected to be limited to the immediate vicinity of ground zero of a nuclear detonation which may be aimed at a military target. Drawing upon that experience, it is seen that human populations which are hundreds, or even thousands, of miles from a nuclear blast may be caused to suffer serious injury, death after prolonged illness and severe birth defects. If we accept the statements of the former Administering Authority, the Marshallese experience demonstrates that human suffering and damage to the environment must occur at great distance, both in time and geography, from the sites of detonations, even when the effort is made to avoid or mitigate harm. Such suffering and environmental damage should not be regarded as necessary to the achievement of military objectives, because there are alternative weapons systems that may be utilized with similar military effectiveness, but without the extensive suffering and damage attending nuclear weapons. Of course such suffering and damage would be much more extensive than experienced in the thinly populated Marshall Islands, were targets to be in or near densely populated areas, such as those in Europe, North America, the Middle East, and the Far East, where there is a continuing risk of nuclear exchanges.'*<sup>37</sup>

There are a number of emerging principles in international environmental law that give further weight to the illegality of any use of nuclear weapons. These include the precautionary principle and the principle of inter-generational justice.

- **Precautionary principle**

The precautionary principle holds that if an action or policy has a suspected risk of causing significant harm to the public, or to the environment, a burden of proof that it is not harmful falls on those taking or proposing to take such action. The principle implies that there is a responsibility to protect the public from exposure to harm, when scientific investigation has

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<sup>36</sup> Findings of the Nationwide Radiological Study, Summary Report prepared for the Cabinet of the Government of the Marshall Islands, December 1994. Environmental Contamination from Weapons Tests, Health and Safety Laboratory, United States Atomic Energy Commission, New York Operations Office, October 1958. Cited in the *Oral Presentation of the Marshall Islands to the International Court of Justice*, Tuesday 14 November 1995

<sup>37</sup> *Oral Presentation of the Marshall Islands to the International Court of Justice*, Tuesday 14 November 1995

found a plausible risk. These protections can be relaxed only if further scientific findings emerge that provide sound evidence that no harm will result.

The principle is included in the *World Charter for Nature* which was adopted by the United Nations General Assembly in 1982:

*'Activities which are likely to pose a significant risk to nature shall be preceded by an exhaustive examination; their proponents shall demonstrate that expected benefits outweigh potential damage to nature, and where potential adverse effects are not fully understood, **the activities should not proceed**;*<sup>38</sup>

The precautionary principle is also included in the Montreal Protocol, Rio Declaration and Kyoto Protocol.

With regard to nuclear weapons, the precautionary principle clearly adds weight to the affirmation by the International Court of Justice of the general illegality of threat and use affirmed. In particular, the precautionary principle could address the one area of uncertainty the ICJ expressed on illegality, i.e. the extreme circumstance of self-defence where the very survival of a State is at stake. The application of the precautionary principle would affirm that the threat or use of nuclear weapons even in this extreme scenario would be illegal unless those threatening to use nuclear weapons could prove that such use would not violate applicable law.

#### - **Inter-generational justice**

Inter-generational justice refers to protecting the rights of future generations, and in particular to ensure that those not yet born are accorded the same economic, social, political and environmental rights as are affirmed for current generations.

C.G. Weeramantry notes that:

*'the rights of future generations have passed the stage when they were merely an embryonic right struggling for recognition. They have woven themselves into international law through major treaties, through juristic opinion and through general principles of law recognized by civilized nations.*

*Among treaties may be mentioned, the 1979 London Ocean Dumping Convention, the 1973 Convention on International Trade in Endangered Species, and the 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage. All of these expressly incorporate the principle of protecting the natural environment for future generations, and elevate the concept to the level of binding State obligation.'*<sup>39</sup>

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<sup>38</sup> UN General Assembly resolution A/RES/37/7, *World Charter for Nature*, adopted on 28 October 1982. <http://www.un.org/documents/ga/res/37/a37r007.htm>

<sup>39</sup> C.G. Weeramantry, Vice-President of the International Court of Justice, Dissenting opinion in the 1996 ICJ Advisory Opinion, p233

The International Court of Justice has affirmed that nuclear weapons threaten, or indeed already violate, the rights of future generations:

*'...the use of nuclear weapons would be a serious danger to future generations. Ionizing radiation has the potential to damage the future environment, food and marine ecosystem, and to cause genetic defects and illness in future generations.'*<sup>40</sup>

Since the 1980's, the concept of intergenerational justice has integrated variously the international law. The UN resolution of October, 30<sup>th</sup> 1980 (A/RES/35/8) has proclaimed the historical responsibility of States for the preservation of nature for present and future generations. A process of diffusion of this concept has occurred both in international environmental law (as a founding principle of environmental law) and in international human rights law (the concept of dignity of humanity and the goal of respect of values through times and space becoming more and more evident).

#### - **Conclusion**

The principles of law outlined above, and the facts on the impact of any use of nuclear weapons, indicate clearly that **any use** of nuclear weapons would be illegal and constitute a crime.

Indeed, the horrific impact of nuclear weapons on human health indicate that their use is not only a violation of international humanitarian law, but an affront to the very concept of a civilized society. Even contemplating the use of such an inhumane and immoral weapon is an erosion of basic human values upon which human society is based.

## **2) Illegality of the threat to use nuclear weapons**

The law of *jus ad bellum* applies during peace-time to the threat to use nuclear weapons. Such law holds that it is illegal to threaten or use force, unless attacked or under imminent threat of attack. Current nuclear deterrence policies fail to meet this law.

In addition, general principles of law hold that if a specific act is illegal, the threat to commit that act is generally also illegal. As such, the International Court of Justice, in applying the laws of warfare to nuclear weapons held in 1996 that the threat or use of nuclear weapons would generally be illegal.

*'If the envisaged use of force is itself unlawful, the stated readiness to use it would be a threat prohibited under Article 2, paragraph 4. Thus it would be illegal for a State to threaten force to secure territory from another State, or to cause it to follow or not follow certain political or economic paths. The notions of "threat" and "use" of force under Article 2, paragraph 4, of the Charter stand together in the sense that if the use of force itself in a given case is illegal - for whatever reason - the threat to use such force will likewise be illegal.'*<sup>41</sup>

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<sup>40</sup> ICJ 1996 Advisory Opinion, para 35

<sup>41</sup> ICJ Advisory Opinion 1996, para 47

As such, the ICJ considered the threat and use of nuclear weapons together, and concluded that the threat or use of nuclear weapons would generally be illegal.

This Tribunal is enjoined to also treat threat and use of nuclear weapons together, in which case the arguments presented in this memorial on the illegality of the various possible uses of nuclear weapons also apply equally to the threat of such uses of nuclear weapons.

This tribunal should reject the arguments by the nuclear-armed States that the threat to use nuclear weapons prevents such use. The appended prosecution brief outlines the logical fallacies and risks of such an approach. The Vancouver Declaration speaks directly to the law in this respect:

*Threat as well as use of nuclear weapons is barred by law. As the ICJ made clear, it is unlawful to threaten an attack if the attack itself would be unlawful. This rule renders unlawful two types of threat: specific signals of intent to use nuclear weapons if demands, whether lawful or not, are not met; and general policies ('deterrence') declaring a readiness to resort to nuclear weapons when vital interests are at stake. The two types come together in standing doctrines and capabilities of nuclear attack, preemptive or responsive, in rapid reaction to an imminent or actual nuclear attack.<sup>42</sup>*

### **3) Responsibility under the law**

The charges laid in this indictment are against the leaders of the nuclear-armed States and of Australia – the “nuclear umbrella” country in which the tribunal is taking place. The leaders of these countries have a primary responsibility to ensure that the policies and practices of their countries comply with international law.

The principles of personal responsibility -- enshrined in the International Military Tribunal (Nuremberg Tribunal), International Military Tribunal for the Far East (Tokyo Tribunal), Ad Hoc Tribunal for Rwanda, Ad Hoc Tribunal for the Former Yugoslavia and Rome Statute for an International Criminal Court-- hold that individuals responsible for war crimes and crimes against humanity are liable under international law.

If the threat and use of nuclear weapons is a violation of international humanitarian law, a crime against humanity and a crime against peace, as the prosecution contends, then the individuals most responsible for these policies are liable and are therefore charged with these crimes.

Individuals responsible for such crimes cannot escape responsibility by claiming that they are merely following government policy. Indeed, the leaders of countries have even less defence because they have specific and ultimate authority for the nuclear weapons policies and practices of their countries.

The Nuremberg Charter, the Charter of the International Military Tribunal Ad Hoc Tribunal for

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<sup>42</sup> The Vancouver Declaration on Law's Imperative for the Urgent Achievement of a Nuclear-Weapon-Free World, adopted at a conference of international lawyers in Vancouver on February 11, 2011.

Rwanda, Ad Hoc Tribunal for the Former Yugoslavia and Rome Statute for an International Criminal Court include in the crimes under their jurisdiction, the planning and preparing of war crimes and crimes against humanity as well as the actual commission of such crimes.

As such, the threat to use nuclear weapons and the planning and preparing for the use of nuclear weapons, in addition to any actual use of nuclear weapons, constitute international crimes. Those most responsible for such crimes, the leaders of the nuclear-armed States, are liable and are therefore charged in this tribunal.

#### **4) Criminality of acts to facilitate, support, aid or abet the use and threat to use nuclear weapons**

General legal principles hold that if an act is a crime, then an act by another to facilitate, aid and abet such an act is also a crime. For example, the Rome Statute of the International Criminal Court holds that

*‘..a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:*

*(a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;*

*(b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;*

*(c) For the purpose of facilitating the commission of such a crime, **aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission.***<sup>43</sup>

The South Pacific Nuclear Weapon Free Zone treaty Act of Australia (1986) includes aiding and abetting of prohibited acts in its list of crimes. For example, Section 13 holds that:

*‘A person who does any act or thing to **facilitate** the manufacture, production, acquisition or testing by any person (including a foreign country) of a nuclear explosive device (whether in or outside Australia) commits an offence against this section.’*

The acts of the Australian government to support nuclear deterrence and to facilitate the use of nuclear weapons, as outlined above, are therefore illegal and criminal.

As such, the Prime Minister of Australia, as the Australian official with highest authority over such acts, is responsible for these acts and is charged with aiding and abetting the commission of such crimes.

#### **5) Injunctive relief**

The prosecution appeals to the tribunal to:

- a) Find the defendants guilty of war crimes, crimes against humanity, crimes against peace, and crimes of threatening, planning and preparing acts which would constitute genocide, ecocide and omnicide;

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<sup>43</sup> Individual criminal responsibility, Article 25 (3), Rome Statute of the International Criminal Court

- b) Instruct the defendants to immediately cease all such acts by;
  - i) declaring that they would never authorize the use of nuclear weapons;
  - ii) decommissioning all nuclear weapons in preparation for their dismantlement and destruction;
  - iii) initiate, or engage in, multilateral negotiations in good faith for the complete prohibition and elimination of nuclear weapons under strict and effective international control.

#### **6) Previous tribunals – The London Nuclear Warfare Tribunal**

On 6th January 1985 the London Nuclear Warfare Tribunal announced its findings after considering an extensive array of submission and after conducting four days of hearings.

The Tribunal found that the weapons developments, strategies, and deployments undertaken by the nuclear-armed States violated the basic rules and principles of international law, including both jus ad bellum and jus in bello.

The tribunal also noted the viability of alternative military strategies to nuclear deterrence, and challenged the wasteful spending on nuclear weapons when such financial and human resources were necessary to address global poverty and to alleviate famine especially in sub-Saharan Africa.

The Tribunal highlighted the individual responsibility of political and military leaders as well as scientists, engineers, soldiers, and workers participating directly or indirectly in preparations for nuclear war. And the Tribunal noted the right of citizens to resist public financing of nuclear weapons. (See Appendix II for the full declaration of the Tribunal).

The findings of the London Nuclear Warfare tribunal are as relevant to the policies and practices of nuclear armed States today, if not more so. The law against nuclear weapons since then has strengthened, as have the mechanisms for ensuring individual responsibility under international law. The feasibility of eliminating reliance on nuclear deterrence and establishing the peace and security of a nuclear-weapon-free world is also much stronger. And the risks to humanity for failing to uphold the law and allowing the risk of nuclear catastrophe to continue are much better understood than in 1985.

This current Tribunal should therefore reaffirm the conclusions of the 1985 Nuclear Warfare tribunal. And this Tribunal should take the next step of ensuring that those most responsible for nuclear policy cease the illegal acts of threatening, planning and preparing for the use of nuclear weapons, and that they are enjoined to undertake multilateral negotiations for the achievement of a secure nuclear-weapon-free world.

## Appendix 1: Vancouver Declaration, February 11, 2011<sup>1</sup>

### Law's Imperative for the Urgent Achievement of a Nuclear-Weapon-Free World

Nuclear weapons are incompatible with elementary considerations of humanity.

Human security today is jeopardized not only by the prospect of states' deliberate use of nuclear weapons, but also by the risks and harms arising from their production, storage, transport, and deployment. They include environmental degradation and damage to health; diversion of resources; risks of accidental or unauthorized detonation caused by the deployment of nuclear forces ready for quick launch and inadequate command/control and warning systems; and risks of acquisition and use by non-state actors caused by inadequate securing of fissile materials and warheads.

Despite New START there are more than enough nuclear weapons to destroy the world. They must be abolished and the law has a pivotal role to play in their elimination. In 1996 the International Court of Justice (ICJ) spoke of "the nascent *opinio juris*" of "a customary rule specifically prohibiting the use of nuclear weapons." Fifteen years later, following the establishment of the International Criminal Court, the entry into force of the Chemical Weapons Convention and the achievement of treaty bans on landmines and cluster munitions, the legal imperative for non-use and elimination of nuclear weapons is more evident than ever.

Reasons advanced for the continuing existence of nuclear weapons, including military necessity and case-by-case analysis, were once used to justify other inhumane weapons. But elementary considerations of humanity persuaded the world community that such arguments were outweighed by the need to eliminate them. This principle must now be applied to nuclear weapons, which pose an infinitely greater risk to humanity.

We cannot forget that hundreds of population centers in several countries continue to be included in the targeting plans for nuclear weapons possessing many times the yield of the bombs dropped on Hiroshima and Nagasaki. The hibakusha – survivors of those bombings – have told us plainly, "No one else should ever suffer as we did." The conventions banning chemical and biological weapons refer to them as "weapons of mass destruction." WMD are, by definition, contrary to the fundamental rules of international humanitarian law forbidding the infliction of indiscriminate harm and unnecessary suffering. As set out in the Annex to this Declaration, that label is best deserved by nuclear weapons with their uncontrollable blast, heat and radiation effects.

The ICJ's declaration that nuclear weapons are subject to international humanitarian law was affirmed by the 2010 Nuclear Non-Proliferation Treaty (NPT) Review Conference. In its Final Document approved by all participating states, including the nuclear-weapon states, the Conference "expresses its deep concern at the catastrophic humanitarian consequences of any use of nuclear weapons, and reaffirms the need for all states at all times to comply with applicable international law, including international humanitarian law."

It is unconscionable that nuclear-weapon states acknowledge their obligation to achieve the elimination of nuclear weapons but at the same time refuse to commence and then "bring to a conclusion," as the ICJ unanimously mandated, "negotiations leading to nuclear disarmament in all its aspects under strict and effective international control."

In statements made during the 2010 NPT Review Conference, one hundred and thirty countries called for a convention prohibiting and eliminating nuclear weapons globally. And the Conference collectively affirmed in its Final Document "that all states need to make special efforts to establish the necessary framework to achieve and maintain a world without nuclear weapons," and noted the "five-point proposal for nuclear disarmament of the Secretary-General of the United Nations, which proposes, *inter alia*, consideration of negotiations on a nuclear weapons convention or agreement on a framework of separate mutually reinforcing instruments, backed by a strong system of verification."

An "absolute evil," as the President of the ICJ called nuclear weapons, requires an absolute prohibition.

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<sup>1</sup> Developed with the input of a conference convened February 10-11, 2011, in Vancouver, Canada, by The Simons Foundation and the International Association of Lawyers Against Nuclear Arms, entitled "Humanitarian Law, Human Security: The Emerging Framework for the Non-Use and Elimination of Nuclear Weapons," in acknowledgement of the Simons Chairs in International Law and Human Security at Simon Fraser University.

## The Law of Nuclear Weapons

Well-established and universally accepted rules of humanitarian law are rooted in both treaty and custom; are founded, as the ICJ said, on “elementary considerations of humanity”; and bind all states. They are set forth in armed service manuals on the law of armed conflict, and guide conventional military operations. They include:

- The prohibition of use of methods or means of attack of a nature to strike military objectives and civilians or civilian objects without distinction. As put by the ICJ, “states must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets.”
- The prohibition of use of methods or means of warfare of a nature to cause superfluous injury or unnecessary suffering.
- The Martens clause, which provides that in cases not covered by international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the *dictates of public conscience*.

Nuclear weapons cannot be employed in compliance with those rules because their blast, heat, and radiation effects, especially the latter, are uncontrollable in space and time. The ICJ found that “radiation released by a nuclear explosion would affect health, agriculture, natural resources and demography over a very wide area” and that it “has the potential to damage the future environment, food and marine ecosystem, and to cause genetic defects and illness in future generations.” Moreover, as the International Committee of the Red Cross has observed, the suffering caused by the use of nuclear weapons in an urban area “is increased exponentially by devastation of the emergency and medical assistance infrastructure.” Use of nuclear weapons in response to a prior nuclear attack cannot be justified as a reprisal. The immunity of non-combatants to attack in all circumstances is codified in widely ratified Geneva treaty law and in the Rome Statute of the International Criminal Court, which provides *inter alia* that an attack directed against a civilian population is a crime against humanity.

The uncontrollability of effects additionally means that states cannot ensure that the force applied in an attack is no more than is necessary to achieve a military objective and that its effects on civilians, civilian objects, and the environment are not excessive in relation to the concrete and direct military advantage anticipated. Other established rules of the law of armed conflict excluding use of nuclear weapons are the protection of neutral states from damage caused by warfare and the prohibition of use of methods or means of warfare that are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment. Recent studies have demonstrated that the detonation of a small fraction of the global nuclear stockpile (*e.g.*, 100 warheads) in cities and the ensuing fire storms would generate smoke causing a plunge in average global temperatures lasting years. Agricultural production would plummet, resulting in extensive famine.

That nuclear weapons have not been detonated in war since World War II contributes to the formation of a customary prohibition on use. Further to this end, in 2010 the United States declared that “it is in the US interest and that of all other nations that the nearly 65-year record of nuclear non-use be extended forever,” and President Obama and Prime Minister Singh jointly stated their support for “strengthening the six decade-old international norm of non-use of nuclear weapons.”

Threat as well as use of nuclear weapons is barred by law. As the ICJ made clear, it is unlawful to threaten an attack if the attack itself would be unlawful. This rule renders unlawful two types of threat: specific signals of intent to use nuclear weapons if demands, whether lawful or not, are not met; and general policies (“deterrence”) declaring a readiness to resort to nuclear weapons when vital interests are at stake. The two types come together in standing doctrines and capabilities of nuclear attack, preemptive or responsive, in rapid reaction to an imminent or actual nuclear attack.

The unlawfulness of threat and use of nuclear weapons reinforces the norm of non-possession. The NPT prohibits acquisition of nuclear weapons by the vast majority of states, and there is a universal obligation, declared by the ICJ and based in the NPT and other law, of achieving their elimination through good-faith negotiation. It cannot be lawful to continue indefinitely to possess weapons which are unlawful to use or threaten to use, are already banned for most states, and are subject to an obligation of elimination.

Ongoing possession by a few countries of weapons whose threat or use is contrary to humanitarian law undermines that law, which is essential to limiting the effects of armed conflicts, large and small, around the world. Together with the two-tier systems of the NPT and the UN Security Council, such a discriminatory approach erodes international law more generally; its rules should apply equally to all states. And reliance on “deterrence” as an international security mechanism is far removed from the world envisaged by the UN Charter in which threat or use of force is the exception, not the rule.

## **Appendix II: London Nuclear Warfare Tribunal - Declaration**

This Appendix presents the Interim Declaration which was issued by the Members of the Tribunal on the last day of hearings at the London Nuclear Warfare Tribunal.

### **Interim Declaration of the London Nuclear Warfare Tribunal 6th January 1985**

After listening to expert testimony for the past four days and considering very extensive written submissions, the London Nuclear Warfare Tribunal issues this Interim Declaration of its main conclusions and recommendations. A reasoned Judgment will be prepared and published in due course. The Tribunal also plans to publish a volume that will contain the evidence and the main documentation on which the Judgment was based.

The Tribunal has been organized and arranged by the British group, Lawyers for Nuclear Disarmament, together with the following supporting organizations: Architects for Peace; Campaign for Nuclear Disarmament; Ecology Party; Haldane Society of Socialist Lawyers; Journalists Against Nuclear Extermination; Medical Campaign Against Nuclear Weapons; National Peace Council; National Union of Public Employees; Scientists Against Nuclear Arms; Scottish Lawyers for Nuclear Disarmament; Society of Friends (Quakers); Teachers for Peace; United Nations Association.

It has been from start to finish a private initiative, operating with complete political independence, and without influence from any government. The organizers did make diligent efforts to obtain the participation of government representatives from the main nuclear powers, but without success. The intention was to present the Judges of the Tribunal with the arguments about nuclear weapons policy in as realistic and careful form as possible. To offset the absence of participation by current political and military leaders, each witness appearing before the Tribunal was cross-examined by a trained and prepared lawyer from a viewpoint that incorporated official thinking, especially prevailing ideas about the morality, legality, and reliability of deterrence as an acceptable way to live with nuclear weapons.

The expert commentary presented to the Tribunal can be divided into four main sections:

- evidence relating to the medical and environmental effects of nuclear warfare, including information about the secondary effect of "nuclear winter";
- evidence relating to the history of the growth of nuclear arms and of proposals for their use in the last forty years, the concepts of deterrence and counterforce and current weaponry and strategy and their bearing on the overall risk of nuclear war now confronting humanity;
- evidence relating to the moral and religious implications of nuclear war preparations, and their consequences for citizen accountability;
- evidence relating to the legal character of nuclear weapons, prevailing strategies and potential patterns of use, as well as the consequences for the individual legal responsibility of leaders and others associated with the use and production of this weaponry.

# 1 Preliminary Conclusions

At this stage of its deliberations the Tribunal is prepared to release the following preliminary conclusions. These conclusions might be modified or extended on the basis of the further reflection required to produce a Tribunal Judgment.

1. It is now established beyond any reasonable doubt that any major nuclear exchange would be an unprecedented human and environmental catastrophe, posing a serious threat to the survival of all life on the planet. One aspect of this threat has been dramatized by the experimental findings that soot and dust from nuclear explosions totalling no more than 100 megatons could produce a "nuclear winter" of at least several months' duration.
2. The evidence presented overwhelmingly convinced the Tribunal that current weapons developments and strategies for their use (such notions as "limited nuclear war", "first-strike options", and "winnable nuclear wars") are creating acute public anxiety and produce a set of tendencies in international affairs that make the outbreak of nuclear war virtually inevitable at some point in the years ahead.
3. The evidence established beyond reasonable doubt that governments of nuclear weapons states have preferable alternatives to their current reliance on deterrence and maintaining a favourable position in the nuclear arms race.
4. The evidence was overwhelmingly convincing that there is no acceptable way to reconcile these weapons developments and strategies with prevailing morality, either as interpreted by the main world religions or by the leading ideas of non-religious political ethics.
5. The Tribunal was satisfied that current and planned weapons developments, strategies, and deployments violate the basic rules and principles of international law both customary and conventional, the procurement and use of such weapons involve infringements of the Charter of the United Nations, the Hague Conventions of 1899 and 1907 on the Law of War, the Geneva Conventions of 1949 and the Geneva Protocols of 1977.
6. The evidence was convincing that the Principles of the Nuremberg Judgment (the *Nuremberg Principles*), unanimously endorsed by a resolution of the United Nations General Assembly, as well as the Genocide Convention, are being violated in the most extreme fashion by ongoing preparation to wage nuclear war, especially to the extent that plans include indiscriminate, poisonous and massive destruction of civilian populations, amounting to a conspiracy to wage aggressive war. It appears to the Tribunal that this is particularly true of newly-developed and highly accurate weaponry.
7. The evidence overwhelmingly established that war preparations are undermining the maintenance of political democracy and constitutional government in the nuclear weapons states, and compromising the sovereign rights that non-nuclear states, especially for those states that adhere to a policy of neutrality.
8. The evidence established that resources devoted to war are excessive and wasteful, even given a commitment to military methods of self-defence, and that this circumstance greatly complicates the challenge of overcoming widespread poverty at home and abroad, an effect especially shocking at this time of massive famine in sub-Saharan Africa.

## 2 Recommendations

These conclusions lead the Tribunal at this stage of its deliberations to offer the following recommendations:

- i. **THAT** official studies be undertaken by governments and international institutions to consider longer term alternative security policies to that of nuclear deterrence, including comprehensive disarmament (within the framework of the 1961 McCloy-Zorin Principles), non-provocative defence arrangements, and the strengthening of the United Nations and regional security organizations (as distinct from Alliances);
- ii. **THAT** immediate steps be taken by governments to renounce unconditionally any reliance on weapons, doctrines, and manoeuvres being developed or possessed for potential first strike or first use roles;
- iii. **THAT** lawyers and lawyers' groups throughout the world accept as a matter of professional responsibility an urgent obligation to create an awareness as to the vital importance of the issues involved and the role which lawyers should play;
- iv. **THAT** also, political and military leaders as well as scientists, engineers, soldiers, and workers consider their own moral and legal responsibility for participating directly or indirectly in preparations for nuclear war and to uphold their personal and collective obligations;
- v. **THAT** peace groups and individual tax-payers consider adopting extraordinary means of non-violent direct action to increase levels of public opposition to current preparations and plans for nuclear war;
- vi. **THAT** moral authorities, legal specialists, and educators, re-examine and extend notions of citizenship and conscientious objection to justify refusals of individuals in military or government service to participate in any way in nuclear war preparations.

Dated this 6th day of January, 1985, at London, England.

Signed by the Members of the Tribunal,

Sean MacBride,  
Chairman of the Tribunal

Richard Falk, Dorothy Hodgkin, Maurice Wilkins,  
Members of the Tribunal